THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOUG WARD,

Grievant,

v. **Docket No. 2015-1085-CONS**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Doug Ward, filed a level one grievance against his employer, Respondent, Mingo County Board of Education, dated March 25, 2015, stating as follows: "WV Code § 6C-2-2 Discrimination, uniformity of pay, WV Code § 18A-2-2 Contract terms. Grievant has been notified of possible 'overpayment.' Grievant contends that payment is correct as per contract and is uniform with other select principals in the county." As relief sought, "[t]he grievant is requesting his salary continue at the contractual present amount. If it is determined that adjustments are required they should be only done by mutual agreement. Any back pay, interest or related benefit that may occur." It is noted that this grievance had been consolidated with that of another employee; however, by Order entered September 29, 2015, the other party was dismissed from this action.

A level one conference was conducted on April 8, 2015. By decision dated April 28, 2015, the grievance was denied. Grievant appealed to level two on May 15, 2015. A level two mediation was conducted on September 2, 2015. Grievant perfected his appeal to level three on September 11, 2015. A level three hearing was conducted on December 11, 2015, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by representative,

Mike Hennessey, West Virginia Education Association, and by counsel, Cullen C. Younger, Esquire. Respondent appeared by counsel, Howard E. Seufer, Jr., Bowles Rice, LLP. This matter became mature for decision on January 27, 2016, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed as a principal and holds a 230-day contract. At the beginning of the 2014-2015 school year, a payroll clerk made an error in calculating Grievant's salary which resulted in his salary being set $13,512.77 more than it should have been. The error was not discovered until February-March 2015. Upon finding the error, Respondent reduced Grievant's pay to the correct salary amount effective March 30, 2015, and sought repayment from Grievant for the overpayment he had received. Grievant asserts that he should have been paid at the higher rate for the remainder of the year, and that Respondent violated his contract by reducing his pay in March 2015. Grievant also alleges discrimination as the principal and assistant principals at another school were not asked to repay any of their salaries. Respondent denies Grievant's claims, and argues that its decision to reduce Grievant's pay in March 2015 and seek repayment was proper because Grievant was overpaid as the result of an *ultra vires* act to which it is not bound. Further, Respondent argues that there was no discrimination because it could not be determined that those other administrators were overpaid. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. At all times relevant herein, Grievant was employed by Respondent as the Principal at Burch Elementary School in Mingo County, West Virginia. Grievant's annual contract term is 230 days.

2. During the 2014-2015 school year, Grievant was initially paid $89,310.15 as his yearly salary. Grievant had contacted someone in the payroll department at the beginning of the school year and was told such would be his salary for the year. Grievant was aware that this salary was higher than the salary he had received during the previous school year.

3. Grievant received sixteen paychecks based upon the $89,310.15 yearly salary amount. However, Respondent discovered in or about February-March 2015 that Grievant was being overpaid due to an error. Respondent determined that Grievant's correct salary was $75,797.38. Thereafter, Respondent recalculated his paychecks to reflect the lower yearly salary amount, and issued the first of such paychecks on March 30, 2015.

4. Richard Duncan, Director of Human Resources for Mingo County Schools, initially discovered the payment error in February 2015 while working on an automated template to generate employees' contracts. Mr. Duncan noticed that there appeared to be discrepancies between the annual salary calculated for Grievant and others by the automated process, and the annual salary Grievant and some others were actually being paid. Mr. Duncan consulted with the payroll clerk, then notified the Board's Treasurer. Thereafter, an investigation was launched to determine whether Grievant was being

overpaid. Superintendent Robert Bobbera was informed of the situation and assisted in the investigation.

5. Respondent has calculated that Grievant was overpaid $8,838.81 from the beginning of the 2014-2015 school year until March 2015. Had Respondent continued to pay Grievant at the higher amount for the rest of the school year, he would have been overpaid $13,512.77. Respondent determined that the overpayment resulted from an error of a payroll clerk.

6. Upon information and belief, the payroll clerk's error that resulted in Grievant's overpayment involved the calculation of that part of Grievant's salary attributable to the thirty days of his annual contract term in excess of 200. A Respondent-approved salary schedule established an index factor based upon the number of days in a school administrator's annual contract. The salary Grievant would have received as a 200-day employee was to be multiplied by that factor to arrive at his actual annual salary. The payroll clerk made that calculation, but divided the result by 200 days to arrive at what she thought was Grievant's daily rate, and then multiplied this daily rate by 230, arriving at the erroneous salary. There was no need for the payroll clerk to calculate a daily rate and multiply by 230; the extended thirty days were already built into the index factor.

7. Grievant was not the only employee who was overpaid as a result of the payroll clerk's error. About a third of the principals and assistant principals in Mingo County Schools were also overpaid. However, Grievant's overpayment was the highest. Respondent adjusted the other employees' paychecks on March 30, 2015, as well.

8. Respondent has sought repayment of the overpayments from Grievant and the other principals and assistant principals. Some have made agreements to repay the overages, and some have not. Grievant has not entered into a repayment agreement with Respondent.

9. The 2014-2015 salaries of the principal and the three assistant principals of Mingo Central High School were calculated and paid using a formula similar to that used by the payroll clerk to arrive at the incorrect salary for Grievant. However, Respondent could not determine whether the salaries of the MCHS principal and assistant principals were calculated incorrectly. Those positions are unique in that the principal has a 261-day contract, and the assistant principals have 240-day contracts. No other principals or assistant principals in the county have such contracts terms. Further, these positions were staffed while Mingo County Schools were under State Board intervention. During such time, Respondent had no authority over personnel matters, including salaries. Respondent could not determine whether the State Department of Education did or did not authorize these salaries. Because its investigation into the MCHS principal's and assistant principals' salaries was inconclusive, Respondent did not seek repayment from the MCHS principal or assistant principals.

10. Since discovering the payment errors to Grievant and others, Respondent approved a new "Supplemental Salary and Extended Contract Schedule" that took effect on July 1, 2015. This new schedule clarifies how the salaries of school level administrators are to be calculated, including those at MCHS.

11. Grievant's salary was reported as $89,310.15 on the Certified List submitted to the West Virginia Department of Education. However, the Respondent Board took no

formal action to approve Grievant's salary at this rate, or to grant him an increase in pay from the prior year.

12. Grievant received his doctorate degree during the 2013-2014 school year. Grievant received an increase in his salary for receiving this degree at that time. During the 2014-2015 school year, Grievant received a $1,000.00 pay increase, as did the other professional school employees. Also, his experience increment for the 2014-2015 school year was approximately $600.00.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant does not appear to dispute that there was an error in the calculation of his salary for the 2014-2015 school year. However, Grievant argues that his salary for

the 2014-2015 school year should have remained at $89,310.15 as that is what he was told at the beginning of the year, and that Respondent's reduction of his pay in March 2015 violated his contract. Grievant further asserts that he should not have to repay any overpayment created by the error of the payroll clerk. Grievant also alleges discrimination arguing that he has been treated differently than the principal and assistant principals at MCHS because they were not asked to repay any of the salaries paid to them during the 2014-2015 school year. Respondent argues that Grievant was never approved to receive $89,310.15 as his salary, and that the payment of the same was the result of an error committed by the payroll clerk. Respondent argues that the payroll clerk's error constitutes an *ultra vires* act that it is not bound to repeat; therefore, it was justified in adjusting Grievant's pay to the correct amount and seeking repayment from Grievant. Further, Respondent denies Grievant's claim of discrimination, asserting that it did not seek repayment from the MCHS principal and assistant principals because it could not establish that they were paid anything in error.

"'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-277 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.,* Docket No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356

(1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).' *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC (Oct. 6, 2008)." *Fields v. Mingo County Bd. of Educ.,* Docket No. 2013-1130-MinED (Feb. 4, 2014).

In another grievance addressing employee payment errors, the Grievance Board stated as follows:

> . . . [I]t is clear an error was made that resulted in Grievants being over paid . . . . While it is certainly understandable Grievants are displeased with the decrease in compensation, this does not make RCBOE's action wrong. Prior 'mistakes [do] not create an entitlement to future incorrect reimbursement. *See Stover v. Div. of Corr.,* Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.,* [Docket No.] 95-15-128 (June 5, 1995).' *Dillon v. Mingo County Bd. of Educ.,* Docket No. 05-29-413 (Apr. 28, 2006).
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> The mistake occurred because of an employee's failure to assess Grievants' experience properly and to apply the correct Code Section. This Grievance Board has previously held that a county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.,* Docket No. 98-41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.,* Docket No. 98-31-342 (Dec. 15, 1998); *Berry v. Boone County Bd. of Educ.*, Docket No. 97-03-305 (Apr. 13, 1998); *Chilton v. Kanawha County Bd. of Educ.,* Docket No. 89-20-114 (Aug. 7, 1989), *aff'd*, Kanawha County Cir. Ct., No. 89-AA-172 (Oct. 4, 1991). Accordingly, Grievants have not met their burden of proof and established a violation of any statute, policy, rule, or regulation that would entitle them to continue to receive compensation granted in error.

Bryant and Shields v. Raleigh County Bd. of Educ., Docket No. 05-41-236 (May 16, 2006).

The evidence presented establishes that the payroll clerk made an error in calculating Grievant's salary that resulted in him being paid in excess of his salary. The payroll clerk informed Grievant of the incorrect salary amount at the beginning of the

2014-2015 school year. Grievant had been paid significantly less the year before, and there had been no action by Respondent to authorize an increase in his salary to $89,310.15. The payroll clerk's error caused the incorrect salary to be paid to Grievant until the error was found. Further, the incorrect salary was listed on the county's Certified List, which was sent to the West Virginia Department of Education. Despite all of this, no one found the payment error until February-March 2015. The payroll clerk's error was an *ultra vires* act, as she was not authorized to make any changes in Grievant's salary, and Respondent is not bound by the same.

Grievant argues that, nevertheless, he should have been paid at the higher rate through the end of the contract year, and that Respondent's actions to reduce his pay in March 2015 violated West Virginia Code § 18A-2-2(a), which states as follows:

> Before entering upon their duties, all teachers shall execute a contract with their county boards, which shall state the salary to be paid and shall be in the form prescribed by the state superintendent. Each contract shall be signed by the teacher and by the president and secretary of the county board and shall be filed, together with the certificate of the teacher, by the secretary of the office of the county board: Provided, That when necessary to facilitate the employment of employable professional personnel and prospective and recent graduates of teacher education programs who have not yet attained certification, the contract may be signed upon the condition that the certificate is issued to the employee prior to the beginning of the employment term in which the employee enters upon his or her duties.

Id. Grievant cites no authority for this argument, other than the statute referenced above. It is noted that neither party has alleged that there was a written contract specifying that Grievant was to be paid $89,310.15. Based upon the evidence presented, this figure was communicated to Grievant by the payroll clerk during a telephone conversation at the beginning of the school year. The undersigned finds no merit in Grievant's argument that

West Virginia Code § 18A-2-2 required Respondent to continue to pay him the incorrect salary for the entire 2014-2015 school year after the error was discovered. The payroll clerk's error was an *ultra vires* act, and the law clearly states that Respondent cannot be bound by it. Further, nothing in this statute conflicts with the established law regarding *ultra vires* acts.

"'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant's claim of discrimination is based upon the fact that the principal and assistant principals at MCHS did not have their salaries reduced and were not asked to repay any of their salaries. Respondent argues that there was no discrimination because

it could not be established that the principal and assistant principals at MCHS were overpaid, and because they have different contract terms than Grievant. It appears that a formula similar to the one used by the payroll clerk that resulted in the overpayment to Grievant and others is actually used to calculate the salaries of the MCHS principal and assistant principals. However, Respondent asserts that it could not determine through its investigation whether the use of that formula for the MCHS principal and assistant principals was authorized or not.

The evidence presented established that the MCHS principal has a 261-day contract, and the assistant principals have 240-day contracts. No other principal or assistant principal in Mingo County has these contract terms. The Respondent's approved salary scale did not provide an index factor for principals and assistant principals having these contract terms. These positions were staffed while Mingo County was under state intervention, and the Respondent Board had no authority over personnel matters or salaries during that time. Respondent was unable to determine from its investigation whether the West Virginia Department of Education did or did not authorize the formula used to calculate the MCHS principal's and assistant principals' salaries. Therefore, the investigation into the MCHS salaries was inconclusive. As it could not be determined whether the principal and assistant principals at MCHS were paid improperly, Respondent did not seek repayment from them.

While it is troubling that no one could determine how the MCHS principal's and assistant principals' salaries were supposed to be calculated, the undersigned cannot find that Grievant has proved his claim of discrimination. The principal and assistant principals at MCHS have contract terms unlike the other principals and assistant principals in the

county. Further, the approved salary scale did not provide an index factor for them, but it did for Grievant and all the other principals and assistant principals with shorter contract terms. Grievant and the MCHS principal and assistant principals were not similarly situated. Further, it was clearly determined that Grievant was overpaid, but the same could not be said about the MCHS principal and assistant principals. If they were not overpaid, they could not be asked to repay anything. It is noted that, as a result of all of this, Respondent approved a new Supplemental Salary and Extended Contract Schedule to clarify how the salaries of school administrators are to be calculated, including those at MCHS, to prevent this from happening again.

Therefore, this grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988).

2. "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-277 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.,* Docket

No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).' *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC (Oct. 6, 2008)." *Fields v. Mingo County Bd. of Educ.,* Docket No. 2013-1130-MinED (Feb. 4, 2014). *See also Bryant and Shields v. Raleigh County Bd. of Educ.*, Docket No. 05-41-236 (May 16, 2006).

3. Grievant was overpaid as a result of the payroll clerk's *ultra vires* act. Respondent was not bound by that mistake. Grievant failed to prove by a preponderance of the evidence that Respondent acted improperly, or violated his contract, by reducing his salary to the correct amount in March 2015 after discovery the error. *See Bryant and Shields v. Raleigh County Bd. of Educ.*, Docket No. 05-41-236 (May 16, 2006).

4. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In order to establish discrimination and favoritism claims under the grievance statutes, an employee must prove the following by a preponderance of the evidence:

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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant failed to prove his claim of discrimination by a preponderance of the evidence.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also,* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: April 21, 2016.

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Carrie H. LeFevre
Administrative Law Judge